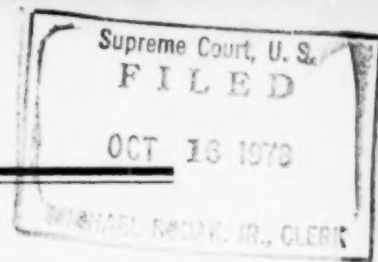


No. 78-640



**In the
Supreme Court of the United States**

OCTOBER TERM, 1978

UNITED STATES OF AMERICA EX REL. PETER O. ABELES,

Petitioner,

vs.

**RICHARD J. ELROD, SHERIFF OF
COOK COUNTY, ILLINOIS,**

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT**

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No.

UNITED STATES OF AMERICA EX REL. PETER O. ABELES,
Petitioner,

vs.

RICHARD J. ELROD, SHERIFF OF
COOK COUNTY, ILLINOIS,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT**

Petitioner, Peter O. Abeles, respectfully prays that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 8, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals, which is unreported, appears in Appendix A to this Petition. The opin-

ion of the United States District Court for the Northern District of Illinois, also unreported, appears in Appendix B to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 8, 1978. A timely filed petition for rehearing and suggestions for rehearing en banc was denied by the Court of Appeals on September 12, 1978. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

This matter is worthy of certiorari. This case affects the administration of interstate extradition throughout the United States. In particular, this case squarely raises the question of whether this Court's seventy-year old decision in *Munsey v. Clough*, 196 U.S. 364 (1905), holding that prior notice and hearing are not constitutionally required in extradition proceedings, should be overruled in light of evolving due process standards.

The questions which this Court should decide are:

(1) Whether due process requires that an individual, whose interstate extradition has been demanded, receive notice and an opportunity to be heard by the governor of the asylum state prior to extradition to the demanding state.

(2) Whether interstate extradition may be predicated upon a defective indictment which is later amended, when no new extradition request is made based upon the new, amended indictment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article IV, Section 2, Clause 2

United States Constitution, Fourteenth Amendment, Section 1

18 U.S.C. §3182

Ill. Rev. Stat., ch. 60, §21

Ill. Rev. Stat., ch. 60, §24

Wis. Stat. §133.01(1)

Wis. Stat. §133.01(3)

The constitutional and statutory provisions involved are set forth in Appendix C to this Petition.

STATEMENT OF THE CASE

Petitioner filed his petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois on May 12, 1976. Petitioner challenged the constitutionality of his proposed extradition pursuant to an extradition warrant issued by the Governor of Illinois at the request of the Governor of Wisconsin.

The Wisconsin Proceedings

The Governor of Wisconsin based his extradition request upon an indictment returned by the grand jury of Dane County, Wisconsin on February 28, 1973. That indictment charged petitioner, his employer, Waste Management of Wisconsin, Inc. ("Waste Management"), and a second employee, with a conspiracy "to restrain competition in the supply or price of an article or commodity" in violation of Section 133.01 of the Wisconsin statutes. It is undis-

puted, however, that Waste Management's business, the handling and disposing of solid waste matter, is a service, which is not covered by the indictment's reference to an "article or commodity".

Petitioner's co-defendants in Wisconsin moved to dismiss the February, 1973 indictment, arguing that the indictment charged and the Wisconsin statute prohibited a restraint of trade in the supply or price of an article or commodity, whereas they were engaged in the business of providing a service. In an order and decision dated June 4, 1973, Judge Jackman, the Wisconsin judge before whom the case was then pending, agreed that waste removal is a service and not "an article or commodity" as stated in the indictment.¹ However, Judge Jackman chose to disregard the words "article or commodity" in the indictment and denied the motion to dismiss. The trial before Judge Jackman resulted in a mistrial.

The Wisconsin case was then reassigned to Judge Maloney, who granted a motion of the Wisconsin prosecutor to amend the indictment to eliminate its reference to articles and commodities. The indictment was thus judicially amended by striking the words "competition in the supply or price of an article or commodity which is the subject of" from paragraph 16 of the indictment.

Wisconsin's extradition request predated the amendment of the indictment. Wisconsin never made a request for the extradition of petitioner predicated on this new, amended indictment. The only request for extradition was that predicated upon the outdated indictment, which, as even the Wisconsin prosecutor recognized, needed to be amended in order to charge a crime.

¹ As Judge Jackman recognized:

The draftsman of the indictment was in error in describing the conspiracy as one to restrain competition in the supply or price of an article or commodity.

The Illinois Proceedings

At the time the grand jury returned the indictment, petitioner was no longer an employee of Waste Management or a resident of Wisconsin. On April 4, 1973, the Governor of Wisconsin sent his extradition request, based on the February 28, 1973 indictment, to the Governor of Illinois. On April 13, 1973, the Governor of Illinois summarily issued an extradition warrant ordering petitioner's arrest and immediate return to Wisconsin. Petitioner received neither notice from nor a hearing before the Governor of Illinois prior to the issuance of the extradition warrant.

On April 30, 1973, petitioner filed a petition for a writ of habeas corpus in the Circuit Court of Cook County, Illinois. This petition was denied and that denial was subsequently affirmed by the Illinois Appellate Court. *People ex rel. Abeles v. Elrod*, 27 Ill.App.3d 155, 326 N.E.2d 443 (1st Dist. 1975). The Illinois Supreme Court denied leave to appeal, 60 Ill. 2d 601 (1975), and this Court denied certiorari. 424 U.S. 914 (1976).

The Federal Court Proceedings

Petitioner filed a petition for a writ of habeas corpus in the District Court on May 12, 1976. As set forth in his habeas corpus petition, petitioner challenged his extradition on the grounds that (1) the Governor of Illinois failed to afford petitioner notice and an opportunity to be heard prior to issuing the extradition warrant; and (2) the only predicate for the extradition warrant was an outdated indictment which failed to charge a crime.

Respondent filed a motion to dismiss the petition for failure to state a claim for relief. On November 30, 1976, the District Court granted respondent's motion to dismiss.

The District Court held that petitioner had no right to notice and a hearing before the Governor of Illinois prior to the issuance of an extradition warrant. Relying on *Munsey v. Clough*, 196 U.S. 364 (1905), the District Court ruled that a hearing before the governor is not constitutionally required. (App. 13.) The District Court also held that the February 28, 1973 indictment was sufficient to charge a crime, finding the defect in the indictment to be a technical one which did not affect the validity of the indictment as a whole. (App. 12.)

On August 8, 1978, the Court of Appeals for the Seventh Circuit affirmed the decision of the District Court. The Court of Appeals held that, under this Court's opinion in *Munsey v. Clough*, 196 U.S. 364 (1905), notice and a hearing before the Governor of Illinois prior to issuance of an extradition warrant is not "constitutionally mandated". The Court of Appeals declined "to break tradition with the time honored precedent established by the decision in *Munsey*." (App. 8.) The Court also concluded that the indictment serving as the predicate for the Governor's extradition warrant met minimum standards to charge a crime and that "the extradition order was therefore constitutionally proper." (App. 7.)

REASONS FOR GRANTING THE WRIT

I.

THIS COURT'S DECISION IN *MUNSEY v. CLOUGH* IS INCONSISTENT WITH PRESENT CONSTITUTIONAL REQUIREMENTS FOR NOTICE AND HEARING AND FAILS TO ACCORD WITH THE REALITIES OF THE EXTRADITION PROCESS.

The lower courts in this case, citing *Munsey v. Clough*, 196 U.S. 364 (1905), declined to consider the merits of petitioner's due process claims. In *Munsey*, this Court held that there was no constitutional right to a hearing before the governor prior to extradition. However, at the time *Munsey* was decided, this Court had not held due process applicable to the range of governmental functions it now encompasses. Moreover, *Munsey* did not consider the due process safeguards necessary to ensure that the discretion available to the governor to grant or refuse extradition is exercised rationally and fairly in accordance with the facts, circumstances and equities of each case.

Munsey should be overruled. Prior notice and hearing are constitutionally required under evolving standards of due process. Furthermore, prior notice and hearing are particularly necessary in light of the realities of present-day extradition practice.

A. Under Present Constitutional Standards, Notice and Hearing Prior To Extradition Are Required As A Matter of Right.

In *Paul v. Davis*, 424 U.S. 693 (1976), this Court recently re-examined the traditional concepts of liberty and prop-

erty interests which come within the protection of the due process clause. As this Court commented with respect to these interests, "we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status." 424 U.S. at 710-711. *See also, Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

One of the basic rights guaranteed by the Constitution is the right of freedom of movement, including the right to travel freely between states or to stay at home. *See, Shapiro v. Thompson*, 394 U.S. 618, 630-631 (1969); *United States v. Guest*, 383 U.S. 745, 757-758 (1966); *Edwards v. California*, 314 U.S. 160, 178 (1941). Also encompassed within that protected legal status are associational rights, *NAACP v. Alabama*, 357 U.S. 449 (1958), and the right to one's home life. *Stanley v. Georgia*, 394 U.S. 557 (1969); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Individuals also have a recognized liberty interest in protecting their integrity, reputation, and standing in the community from being damaged because of governmental action. *Goss v. Lopez*, 419 U.S. 565, 574-575 (1975); *Wisconsin v. Constantineau*, *supra*, at 437.

Interstate extradition results in the deprivation of all of these basic rights. Extradition means that an individual loses his right to remain where he chooses and to associate with his family and friends of his choice. At the same time, extradition taints the good name and standing of an individual in his community. The significant loss of liberty which extradition entails has been aptly described as follows:

At best extradition means an extended period of detention, involving custody pending administrative arrangements in two states as well as forced travel in between. At worst it means separation from a familiar

jurisdiction and effective denial of the support of family, friends and familiar advisors. *Ierardi v. Gunter*, 528 F.2d 929, 930 (1st Cir. 1976).

See also Kirkland v. Preston, 385 F.2d 670 (D.C. Cir. 1967).

Termination of such essential liberty and property interests constitutes a grievous loss and must be preceded by due process guarantees. Basic among these guarantees is notice and an opportunity for a hearing, for "the right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

Notice and hearing must be afforded at a meaningful time, or before the deprivation takes place. *Goss v. Lopez*, 419 U.S. 565 (1975); *Morrissey v. Brewer*, 408 U.S. 471 (1972). In the case of extradition, notice and hearing must accordingly be afforded before the governor issues his extradition warrant. Nevertheless, in this case, petitioner was afforded none of those procedural safeguards, as the extradition warrant was issued without notice or an opportunity to be heard. The courts below, citing *Munsey v. Clough*, 196 U.S. 364 (1905), upheld this procedure, declining to overturn the traditional rule deeming extradition proceedings to be summary in nature.

This Court, however, has increasingly required due process in "summary proceedings" involving serious deprivations of liberty or property. The expanding concept of due process was aptly noted by Mr. Justice Powell in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 610 (1975) (Powell, J., concurring), where this Court struck

down a Georgia statute permitting prejudgment attachment:

... [T]he Court in the past unanimously approved prejudgment attachment liens similar to those at issue in this case. [Citations omitted.] But the recent expansion of concepts of procedural due process requires a more careful assessment of the nature of the governmental function served by the challenged procedure and of the costs the procedure exacts of private interests. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 263-266 (1970); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

Thus, the fact that a proceeding has traditionally been summary in nature no longer immunizes it from basic due process requirements. In *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969), this Court accordingly held unconstitutional prejudgment garnishment proceedings which did not provide for notice and hearing prior to seizure of an individual's wages. Similarly, *Fuentes v. Shevin*, 407 U.S. 67 (1972), declared unconstitutional summary seizure of personal property under the long honored writ of replevin. Indeed, the recent expansion of due process by this Court has recognized a broad spectrum of interests not previously considered to require protection. See, e.g., *Bell v. Burson*, 402 U.S. 535 (1971) (suspension of uninsured motorist's driver's license unless security posted); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (termination of welfare benefits); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole revocation); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation revocation); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (loss of prison inmate's good time); *Goss v. Lopez*, 419 U.S. 565 (1975) (suspension of school student for short time period).

Applying the expanded concept of due process to the extradition proceedings at issue here, petitioner's interest

in prior notice and hearing clearly outweighs the state's interest in summary proceedings. Petitioner's interest is in avoiding improper or unfair displacement and being compelled to defend against extraterritorial claims in a foreign forum. Petitioner should be allowed to "tell his side of the story in order to make sure that an injustice is not done." *Goss v. Lopez*, *supra*, at 580. Moreover, the state has no interest in depriving petitioner of his liberty without assuring that his extradition is not based on an erroneous evaluation of the facts and circumstances in his case. See, *Morrissey v. Brewer*, *supra*, at 483-484.

In short, under the evolving standards of due process recognized by this Court, prior notice and hearing must be afforded in the extradition process. This Court should accordingly grant certiorari and overrule *Munsey v. Clough*.

B. Under Present Extradition Practices, Prior Notice and Hearing Are Also Necessary.

Under present practices, the governor of an asylum state exercises broad discretion in granting or denying extradition in individual cases. The governor's decision in this regard involves a factual determination. Notice and hearing should be mandatory to ensure that each individual has an opportunity to present the facts, equities and circumstances of his case for the governor's consideration before extradition takes place.

In *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861), this Court concluded that the duty of the governor to turn over a fugitive when the papers are in order, although ministerial, was not mandatory, but rather "declaratory of the moral duty" of the governor. *Id.* at 106-107. The framers left final extradition decisions to the discretion of

the state executive. Governors have conducted prior hearings in extradition cases and have refused extradition for failure to satisfy constitutional requirements. Even where constitutional requirements are satisfied, governors have also refused extradition based upon the facts and circumstances of a particular case. Thus, extradition has been refused on the basis of equitable factors, substantive defenses to a crime, and due process violations in the demanding state. See, Comment, *Interstate Rendition: Executive Practices and the Effects of Discretion*, 66 Yale L.J. 97, 106-109 (1956).

In *South Dakota v. Brown*, 20 Cal. 3d 765, 144 Cal.Rptr. 758, 576 P.2d 473 (1978) (en banc), the Supreme Court of California expressly recognized and sanctioned the discretion involved in the governor's extradition function. As that court emphasized, the exercise of such discretion is both necessary and valid to avoid mechanical application of absolute rules and to ensure that justice is achieved in a particular case. Describing the types of factors that only the governor could consider and which would justify refusing extradition, the court concluded:

It would be a harsh rule that stripped the Governor of all power to deny extradition in a case in which, for example, the Governor is satisfied that a fugitive, since residing in California, has established himself as a worthy law-abiding citizen, or in which his physical safety or right to a fair trial cannot be assured in the demanding state, or the offense charged does not constitute a crime in California. In a given case, various unanticipated equitable considerations may be paramount. *Id.* at 482.

South Dakota v. Brown is a recognition of the practice in effect today throughout the country. Since 1930, all of the states have adopted the Uniform Criminal Extradition Act. That Act confers discre-

tion upon the governor in the exercise of his extradition power. Section 7 provides that "[i]f the Governor decides that the demand should be complied with, he shall sign a warrant of arrest." See, e.g., Ill.Rev.Stat., ch. 60, §24. Section 4 authorizes the Governor to "call upon the Attorney General or any prosecuting officer . . . to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered." See, e.g., Ill.Rev.Stat., ch. 60, §21. These provisions make sense only if construed to confer discretion upon the governor to consider the facts and circumstances in each case.²

The governor's ultimate decision in extradition cases depends on factual considerations. The governor must evaluate the infirmity of a charge, good character, long residence in the asylum state, contribution to the asylum state, or the extreme and unusual hardship that would result from extradition. Proper exercise of the governor's discretion on these matters requires that the governor have the facts in each case so that he can decide rationally whether the standards for denying extradition are applicable. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972); K. Davis, *Administrative Law* 443 (6th Ed. 1977).³

² The California Supreme Court in *South Dakota v. Brown*, *supra*, acknowledged that five governors in a row had refused to honor extradition requests which had been in proper form. The court also noted that in 84 cases from 1959 to 1976, California's extradition requests to other states had been declined. 576 P.2d at 481, 482.

³ Without a hearing before the governor, the accused is limited to challenging his extradition by means of a writ of habeas corpus. However, courts at habeas corpus hearings have refused to consider the facts, circumstances, and equities in individual cases. *Reed v. Colpoys*, 99 F.2d 396, 399 (D.C. Cir. 1938), *cert. denied*

(footnote continued)

Due process requires that the individual have prior notice of the charges and an opportunity to present his side of the story to the governor. The Due Process Clause mandates the minimum safeguards of notice and hearing to prevent arbitrary decision-making. *Goss v. Lopez*, 419 U.S. 565, 581 (1975); *Jay v. Boyd*, 351 U.S. 345, 363 (1956) (Black, J., dissenting); *Accord*, Comment, *Indigents' Right to Appointed Counsel in Interstate Extradition Proceedings*, 28 Stan. L.Rev. 1039, 1058-59 (1976) (concluding that "due process applies in the extradition process".) The decision of the Court of Appeals, upholding the summary issuance of a warrant for petitioner's arrest and extradition, deprived petitioner of due process of law and should be reversed.

II.

EXTRADITION PREDICATED UPON A DEFECTIVE INDICTMENT WHICH IS LATER AMENDED CANNOT PROCEED, CONSISTENT WITH CONSTITUTIONAL AND STATUTORY REQUIREMENTS, WHEN NO NEW EXTRADITION REQUEST IS MADE BASED UPON THE NEW, AMENDED INDICTMENT.

Under Article IV, Section 2 of the Constitution and the federal statute enacted to implement the Constitutional provision, 18 U.S.C. §3182, extradition may proceed only if the individual whose return is sought is charged with a crime by the demanding state. A fundamental prerequisite is that the indictment or information on its face con-

(footnote continued)

305 U.S. 598 (1938); *Commonwealth ex rel. Banks v. Hendrick*, 430 Pa. 575, 243 A.2d 438 (1968). A hearing before the governor is therefore necessary if the accused is to have the opportunity to plead the facts and equities of his case in order to avoid extradition. No other forum is available to him.

tain and describe each element of the crime charged. *Pierce v. Creecy*, 210 U.S. 387 (1908).

The Court of Appeals failed to analyze whether the indictment returned against petitioner in this case charged a crime. In fact, the February 28, 1973 indictment against petitioner and his co-defendants charged a conspiracy "to restrain competition in the supply or price of an article or commodity". It is undisputed that this indictment did not validly charge a crime, since the business activities of Waste Management did not involve articles or commodities. In the Wisconsin proceedings involving petitioner's co-defendants, but not petitioner, the defect in the indictment was recognized, and the indictment was amended in an effort to eliminate it. However, Wisconsin never made a new extradition request based on the amended indictment. In these circumstances, this failure of the original indictment to describe any possible offense against petitioner renders the indictment an invalid basis for extradition.⁴

Wisconsin never supported its extradition request with an amended indictment certified as authentic by the governor. This is required under the federal statute regulating extradition. 18 U.S.C. §3182. Strict compliance with the statute's terms is mandatory. *Compton v. Alabama*, 214 U.S. 1 (1909). The decision of the Court of Appeals

⁴ Recognizing that the grand jury indictment did not charge a crime, the Wisconsin prosecutor chose not to return to the grand jury but rather sought and obtained a judicial amendment of the indictment. The amended indictment has been held sufficient by the Wisconsin courts. *State v. Waste Management of Wisconsin, Inc.*, 81 Wis.2d 555, 261 N.W.2d 147 (1978). However, extradition here is based on the original and not the amended indictment. To extradite petitioner on this basis would violate constitutional precepts. See *Ex Parte Bain*, 121 U.S. 1, 13 (1887); *Stirone v. United States*, 361 U.S. 212, 217 (1960).

would permit petitioner's extradition to proceed on an indictment which fails to charge a crime. This result is inconsistent with the constitutional and statutory requirements of extradition and should be reversed.

CONCLUSION

For all of the reasons stated above, petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Dated: October 16, 1978

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Submitted May 15, 1978

August 8, 1978

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*

Hon. WALTER J. CUMMINGS, *Circuit Judge*

Hon. ROBERT A. SPRECHER, *Circuit Judge*

UNITED STATES OF AMERICA ex rel.

PETER O. ABELES,

Petitioner-Appellant,

No. 77-1031

vs.

RICHARD J. ELROD, Sheriff of Cook County, Illinois,

Respondent-Appellee.

Appeal from the United States District Court for
the Northern District of Illinois, Eastern
Division.

No. 76-C-1772

John F. Grady, *Judge*.

ORDER

This case requires us to determine whether the interstate extradition of Peter O. Abeles, a fugitive from justice and the petitioner-appellant herein, by reason of an April 13, 1973, executive order of the Governor of Illinois (the asylum state) returning petitioner to Wisconsin (the demanding state) to face charges of conspiracy to restrain

trade and bid-rigging in violation of that State's anti-trust laws, would violate Article 4, Section 2, Clause 2 and the Fourteenth Amendment to the United States Constitution.

We conclude that it does not, and for the reasons more fully explained below, affirm the district court's¹ denial of habeas corpus relief, pursuant to Rule 2, FedR.App.P.²

Jurisdiction on appeal is by virtue of 28 U.S.C. § 1291. Also, since this appeal is taken as of right no certificate of probable cause is required. Furthermore, we note that this Court previously ordered that the execution of the extradition order by the respondent, Richard J. Elrod, Sheriff of Cook County, Illinois, be stayed pending our review of this matter. Therefore, in light of our affirmance, we vacate that order forthwith.

I.

It should be noted at the outset that this Circuit is not without precedent in this area of the law. Thus in *United States v. O'Brien*, 138 F.2d 217, 218 (7th Cir. 1943), *cert. denied* 321 U.S. 766 (1944), we summarized the federal nature of interstate extradition proceedings along with the relevant scope of our inquiry on review, as follows:

Unquestionably, the source of all authority for the extradition of an alleged fugitive from justice from one state to another is found in Art. IV, Sec. 2, clause 2 of the Constitution of the United States, which is not self-executing, but is made effective by [18 U.S.C. § 3182]

¹ United States District Court for the Northern District of Illinois, Hon. John F. Grady, Judge Presiding.

² Accordingly, we deny appellee's motion for summary affirmance under Circuit Rule 15.

construction of which has frequently been before the Supreme Court and construed as placing the burden upon the governor of the asylum state to determine, before complying with the demand, (a) whether the person demanded is substantially charged with a crime and (b) whether he is a fugitive from justice. The first is a question of law and the second is a question of fact, which the governor, upon whom the demand is made, must decide, upon such evidence as is satisfactory to him. Strict common-law evidence is not necessary, and the statute does not prescribe the character of such proof, nor how it shall be authenticated. *Roberts v. Reilly*, 116 U.S. 80, 6 S.Ct. 291, 29 L.Ed. 544; *Ex parte Reggel*, 114 U.S. 642, 5 S.Ct. 1148, 29 L.Ed. 250; *Munsey v. Clough*, 196 U.S. 364, 25 S.Ct. 282, 49 L.Ed. 515; *United States ex rel. Darcy v. Superintendent of County Prisons of Philadelphia*, 3 Cir., 111 F.2d 409. The requisition, with its accompanying affidavit, together with the Governor's rendition warrant, are all to be considered as evidence and made a prima facie case against the accused, and upon him lies the burden of overcoming it. *Munsey v. Clough*, *supra*, 196 U.S. 373, 25 S.Ct. at page 284, 49 L.Ed. 515."

However, on appeal petitioner has challenged only the sufficiency of the indictment, and may be deemed to have waived the latter issue concerning his fugitive status. In addition, absent any argument to the contrary, we have assumed that the Governor of Illinois complied fully with that state's statutes governing extradition and that all papers before him (excepting, of course, the challenged indictment) were proper as to both form and substance. See Uniform Criminal Extradition Act, Chapter 60, §§ 18-49, Illinois Revised Statutes (1975).

More specifically, the following issues have been advanced with respect to the indictment. Firstly, whether the January 1973 grand jury indictment returned in Dane County, Wisconsin, naming petitioner as a co-conspirator, failed to state a crime under the anti-trust laws of Wisconsin, Section 133.01(1) and (3), Wis. Stats. (1971); and secondly, whether a Wisconsin trial court judge illegally amended the indictment by striking certain words therein rendering it a nullity. In addition, petitioner claims that the Fourteenth Amendment requires the Governor of an asylum state to give notice and a hearing to a fugitive from justice before ordering his extradition.

II

The facts in this case, as well as the pertinent state court history, are reported below in *People ex rel. Abeles v. Elrod*, 27 Ill. App. 3d 155, 326 N.E. 2d 443 (First District 1975), *reh. denied*, leave to appeal to the Illinois Supreme Court denied, 60 Ill. 2d 601, *cert. denied*, 424 U.S. 914 (1976). We therefore take judicial notice of the same and need not repeat them here.

But before addressing the issues, it is necessary to report a late happening in the Wisconsin Supreme Court made known to us by the respondent-appellee pursuant to Circuit Rule 11, and which in our opinion lends new and controlling authority as to the legal sufficiency of the Dane County indictment. Thus in *State of Wisconsin v. Waste Management of Wisconsin, Inc., d/b/a City Disposal Co.*, No. 75-412-CR (Wis., filed January 3, 1978) *rehearing denied*, Justice Hansen reviewed on direct appeal the conviction of one of petitioner's co-defendants, Waste Management, and discussed at length the identical challenges to the common indictment advanced here. At issue in *Waste*

Management, supra, was whether the indictment failed to state a crime under Section 133.01(1) and (3), Wis. Stats. (1971), and whether a Wisconsin trial court judge illegally amended the indictment by striking the words "article or commodity" therefrom. After careful consideration of the charging portion of the indictment, Justice Hansen concluded that the judicial amendment of the indictment amounted to "a formal deletion of words, and not a substitution of one charge for another." Slip Op. at 4.

Citing Section 971.26, Wis. Stats. (1971), which provides that an indictment in Wisconsin will not be deemed invalid *per se* because of a defect or imperfection so long as it may be amended without prejudicing the defendant, the Court continued:

The test in this state is whether the defendant was prejudiced by this change. As with any information, an indictment must inform the accused of what particular acts he is alleged to have committed. *Notice to the accused, not perfection in draftsmanship is the key.* . . . In the case before us, the defendant was informed long before trial that the state was required to proceed solely on the theory that the defendant violated the first and not the second sentence of Sec. 133.01(1). This amendment in the indictment is no foundation for a claim of prejudice."

Slip Op. 4-5 (emphasis added).

Also, as for the argument that the indictment did not charge a crime under Wisconsin law because solid waste removal was a "service" and not an "article or commodity", Justice Hansen clarified the Court's previous holding in *State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W. 2d (1966), explaining that restraint of services was also

within the statutory prohibition and that the second sentence of Section 133.01(1) merely recited "non-exclusionary" examples of conduct which was prohibited therein. *Ibid* at 6-7.

III.

It is apparent, therefore, that under the present interpretation of Wisconsin law, not only was the judicial amendment of the common indictment permissible, but did not result in any *prejudice*. Also, it is clear that the amended indictment without question states an offense under Wisconsin law. *Waste Management, supra*. This, of course, is all with the benefit of hindsight and is quite unlike the usual situation where the habeas corpus petitioner seeks to test the sufficiency of the demanding state's indictment prior to its construction by that state's courts.

However, be that as it may, the petitioner nonetheless calls our attention to our "broad powers in habeas corpus proceedings" and asks us to "consider fully the merits of federal constitutional claims without being bound by prior state adjudications" citing *Fay v. Noia*, 372 U.S. 391 (1963) and *United States ex rel. McClintock v. Meyering*, 75 F.2d 716 (7th Cir. 1934).

Yet even if we were to assume for purposes of argument that the Wisconsin Supreme Court had not addressed these issues, the scope of our inquiry is limited by a long line of extradition cases holding that attacks upon the demanding state's indictment are cognizable on habeas corpus review only if the objection destroys its sufficiency to charge a crime. *Pierce v. Creecy*, 210 U.S. 387, 402 (1908).

Thus in *Pierce, supra* at 402, Justice Moody formulated the following benchmark rule:

The only safe rule is to abandon entirely the standard to which the indictment must conform, judged as a

criminal pleading, and consider only whether it shows satisfactorily that the fugitive has been in fact, however inartificially, charged with crime in the State from which he has fled. *Roberts v. Reilly*, 116 U.S. 80, 95; *Pearce v. Texas*, 155 U.S. 311, 313; *Hyatt v. Corkran*, 188 U.S. 691, 709; *Munsey v. Clough*, 196 U.S. 364, 372; *Davise's Case*, 122 Massachusetts, 324; *State v. O'Connor*, 38 Minnesota, 243; *State v. Goss*, 66 Minnesota, 291; *Matter of Voorhees*, 32 N.J.L. 141; *Ex parte Pearce*, 32 Tex. Crim. 301; *In re Van Sciever*, 42 Nebraska, 772; *State v. Clough*, 71 N.H. 594.

We are satisfied here that the common indictment presented to the Governor of Illinois met this minimum standard and that the extradition order was therefore constitutionally proper. We need only be reminded that extradition is *sui generis* and a summary proceeding addressed to the discretion of the state's chief executive. Furthermore, we note with a degree of pragmatism that "[e]xtradition is not a means of determining the guilt or innocence of the accused . . . [r]ather, it is a means of ascertaining whether the evidence is sufficient to detain and deliver the accused for trial in another state." *Smith v. State of Idaho*; 373 F.2d 149, 155 (9th Cir. 1967), citing *Biddinger v. Commissioner of Police*, 245 U.S. 128, 132-133 (1917).

Finally, as for petitioner's argument that he was entitled under the due process clause of the Fourteenth Amendment to notice and a hearing before the Governor of Illinois issued his extradition warrant, we agree with the district court that *Munsey v. Clough*, 196 U.S. 364, 372 (1905) is dispositive of this claim and that such a hearing is not constitutionally mandated. Therefore, we remain unpersuaded by petitioner's reference to the Supreme Court's

recently expanded concept of due process in such diverse cases as *Goss v. Lopez*, 419 U.S. 565 (1975), *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Fuentes v. Shevin*, 407 U.S. 67 (1972), among others, as compelling us to presently break tradition with the time honored precedent established by the decision in *Munsey, supra*. Although we note that some states including Illinois,³ have adopted informal procedures, whereby an individual may request a hearing before the state's executive officer prior to or even after the issuance of an extradition warrant, the record in this case shows no attempt whatsoever on petitioner's part to apply for such a discretionary hearing. Therefore, the failure to have such a discretionary hearing is at least partially of petitioner's own making.

Accordingly, we direct the Clerk of this Court to enter an appropriate order affirming the district court's denial of habeas corpus relief.

AFFIRMED.

³ See *Interstate Rendition: Executive Practices and the Effects of Discretion*, 66 Yale L.J. 97, 101 n.25 (1956).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASERN DIVISION

PETER O. ABELES,

Petitioner,

vs.

RICHARD J. ELROD, Sheriff of Cook County, Illinois,
Respondent.

NO. 76 C 1772

MEMORANDUM OPINION

The court believes that the petition for a writ of habeas corpus fails to state a claim upon which relief can be granted. The reasons for this conclusion are stated below.

THE AMENDMENT OF THE INDICTMENT

On May 27, 1975, Judge Maloney of the Dane County Circuit Court purported to amend the indictment by striking from Paragraph 16 the words "... competition in the supply or price of an article or commodity which is the subject of. . . ." Petitioner argues that this purported amendment by the court renders the indictment invalid, since it is no longer the product of the grand jury. Respondent does not address himself to this question. (The opinion of the Illinois Appellate Court considered the argument that the interpretation of the indictment by Judge Jackman

in his order of June 4, 1973, was, in effect, an amendment of the indictment, but the opinion was rendered prior to the actual purported amendment by Judge Maloney on May 27, 1975. *People ex rel. Abeles v. Elrod*, 27 Ill.App.3d 155, 326 N.E.2d 443, 448 [1st Dist. 1975]).

It appears to this court that the amendment by Judge Maloney was either proper or it was harmless. If the language he struck was a mere formal defect or surplusage, it was proper to strike it and the integrity of the indictment is unaffected. If the language was an essential part of the indictment, then Judge Maloney lacked the power to strike it and his action was simply void. If that is the case, the indictment remains the way it was before Judge Maloney purported to amend it.

Whether the language in question was properly stricken is not a matter to be determined in an extradition proceeding. It is a question to be determined by the courts of the State of Wisconsin. As indicated below, this court does not believe the defendant will be prejudiced by a ruling either way on the matter.

THE SUFFICIENCY OF THE INDICTMENT

The question on this petition for habeas corpus is whether the indictment substantially charges a crime. The question is not whether the indictment is perfect or immune to motion. If extradition required an indictment whose sufficiency was entirely free from doubt, the statute requiring extradition would have little meaning.

In determining the sufficiency of the indictment, we assume that the attempted amendment by Judge Maloney was void, so that the indictment stands as originally returned by the grand jury. The question, then, is whether

the indictment substantially charges an offense when, in Paragraph 16, it alleges something which is not a crime under the law of Wisconsin. To answer this question, we must consider the indictment as a whole.

Anyone reading Paragraphs 13 through 15 and 17 through 20 of this indictment knows that the defendant is charged with a conspiracy to restrain price competition in the removal of solid waste in Dane County. The conspiracy is described clearly and there is no uncertainty or ambiguity as to its alleged objective. These paragraphs are sufficient to charge an offense under the first sentence of Section 133.01(1) of the Wisconsin statutes, the section cited in the indictment.

This first sentence of the section broadly declares all combinations and conspiracies in restraint of trade to be illegal. The second sentence of the section goes on to declare that a specific type of restraint, namely, the restraint of competition in the supply or price of an article or commodity, "is hereby declared an illegal restraint of trade." The activity specified in the second sentence of this section, therefore, is simply one form of the generic crime described in the first sentence. Anyone guilty of violating the second sentence is necessarily guilty of violating the first, although one may violate the first without violating the second if no article or commodity is involved.

Returning to Paragraph 16 of the indictment, it alleges that the defendants conspired to restrain competition in the supply of an article or commodity. Paragraphs 13 through 15 and 17 through 20 make it clear that the alleged restraint was directed at the price for removal of solid waste. Whether solid waste be regarded as a commodity or not, the charge is the same. The indictment is sufficiently clear to enable the petitioner to prepare his defense

and it is sufficiently specific to allow a plea of double jeopardy in the event of a later prosecution for the same conduct. Thus, this indictment passes the traditional constitutional tests of sufficiency. Petitioner's argument that the grand jury might not have returned this indictment had they known that solid waste was not considered an article or commodity cannot be taken seriously.

It is common for a conspiracy to have multiple objectives, and, if this indictment be regarded as charging a conspiracy to restrain trade in a commodity as well as a service, that would not render it defective. Nor would the prosecution fail by reason of the fact that the Wisconsin court has held solid waste not to be an article or commodity. Failure to prove one object of the conspiracy would not ordinarily be a fatal variance, and a conviction would be warranted if the proof shows that the conspiracy contemplated at least one of the alleged objects.

In short, it seems clear that this indictment, even as originally returned by the grand jury, substantially charges the crime of conspiracy under Section 133.01(1) of the Wisconsin statutes. The error of the draftsman in referring to an article or commodity in Paragraph 16 is a technical defect which does not affect the substance of the charge. There is nothing unfair about requiring petitioner to answer to the indictment in Wisconsin, where he will have ample opportunity to make what he can of the defect he sees in Paragraph 16.

THE RIGHT TO A HEARING

Petitioner argues that the Governor should conduct a hearing before ordering extradition. It appears that petitioner has in mind something more than a determination by the Governor that the indictment does substantially

charge a crime and that petitioner is the person named in the indictment. However, petitioner has not enlightened this court as to what additional issues he believes should be presented. At page 29 of his memorandum, he states that the law requires that he be afforded "some meaningful opportunity to present his case. . . ." He does not explain what he means by "his case." Apparently petitioner does not seriously contend that the Governor should conduct an evidentiary hearing on the merits of the charge, and, short of that, we can think of no kind of hearing which would benefit the petitioner. The kind of hearing required by due process varies with the type of inquiry before the tribunal. It is not feasible for a Governor of a state to inquire into the merits of a criminal charge pending in another state, nor has it ever been thought that due process requires him to do so. A hearing is not even required on the narrow issues which are before the Governor. *Munsey v. Clough*, 196 U.S. 364 (1905); *Marbles v. Creecy*, 215 U.S. 63 (1909). Petitioner's reliance on recent due process cases involving such matters as garnishment and replevin is entirely misplaced. That subject matter is simply not analogous to an extradition proceeding, and we note that petitioner has merely cited these cases without attempting to relate them in a practical way to the case before us.

The petition of a writ of habeas corpus is dismissed.

DATED: November 30, 1976.

ENTER: /s/ John F. Grady

United States District Judge

APPENDIX C

United States Constitution, Article IV, Section 2, Clause 2

A Person charged in any State with Treason, Felony, or other crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

United States Constitution, Fourteenth Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C., Section 3182. Fugitives from State or Territory to State, District or Territory.

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or

Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.

Ill.Rev.Stat. 1975, ch. 60, Section 21. Governor may investigate case.

When a demand shall be made upon the Governor of this State by the Executive Authority of another state for the surrender of a person so charged with crime, the Governor may call upon the Attorney General or any prosecuting officer in this State to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered.

Ill.Rev.Stat. 1975, ch. 60, Section 24. Issue of Governor's warrant of arrest; Its recitals.

If the Governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance.

App. 16

Wis.Stat., 1971, Section 133.01(1) and (3)

(1) Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal. Every combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, to be produced or sold therein or constituting a subject of trade, or commerce therein, or which combination, conspiracy, trust, pool, agreement or contract shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this state, or fix any standard or figure in which its price to the public shall be in any manner controlled or established, is hereby declared an illegal restraint of trade. Every person, corporation, copartnership, trustee or association who shall either as principal or agent become a party to any contract, combination, conspiracy, trust, pool or agreement herein declared unlawful or declared to be in restraint of trade, or who shall combine or conspire with any other person, corporation, copartnership, association or trustee to monopolize or attempt to monopolize any part of the trade or commerce in this state shall forfeit for each such offense not less than \$100 nor more than \$5,000.

(3) Whoever violates sub. (1) may be fined not more than \$5,000 or imprisoned not more than 5 years or both.